Filed 6/5/07 Otero v. Kaiser Foundation Health Plan CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FRANK OTERO et al., Plaintiffs and Appellants, v. KAISER FOUNDATION HEALTH PLAN, INC., et al., Defendants and Respondents.	B181169 (Los Angeles County Super. Ct. No. BC214853)

APPEAL from a judgment of the Superior Court of Los Angeles County. Wendell Mortimer, Jr., Judge. Affirmed.

Tristram T. Buckley for Plaintiffs and Appellants.

Murchison & Cumming, Edmund G. Farrell III, B. Casey Yim; Nossaman, Guthner, Knox & Elliott, Scott P. DeVries, Carl L. Blumenstein and Scott N. Yamaguchi, for Defendants and Respondents Kaiser Foundation Health Plan, Inc., et al.

Cooksey, Toolen, Gage, Duffy & Woog and Robert L. Toolen for Defendants and Respondents Malcom Eyman, Sylvester Sierra, Josephine Sierra and Luma Magnabijan.

Fonda & Fraser and Peter M. Fonda for Defendants and Respondents Temple Community Hospital and Robin Rapp.

* * * * * *

Plaintiffs and appellants, Frank Otero, Al De Guzman, Grace Adap, Susan San Diego and a purported class of similarly situated students in a hemodialysis technician educational program (collectively Otero) appeal from a judgment of dismissal entered after the trial court granted a special motion to dismiss their claim under the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.)[1] (CLRA), sustained demurrers without leave to amend to other causes of action and after Otero failed to timely amend as to the remaining causes of action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

First Amended Complaint (FAC)

Appellants are alleged to be hardworking, low-income immigrants suing on their own behalf and on behalf of a class of approximately 120 "others similarly situated . . . ." Otero allegedly enrolled in and paid between $2,500 and $3,500 for a course of study offered by Pacific Education Center (PEC) and others that was falsely represented as leading to certification as a hemodialysis technician. Otero expended in excess of 420 hours attending the courses believing that he would be awarded the certificate that is required to work as a hemodialysis technician.

The respondents and defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Southern California Permanente Medical Group (collectively Kaiser entities), and Temple Community Hospital (Temple), along with Mobile Dialysis Services, Inc. (doing business as Compton Community Dialysis Centers) (Mobile) provided clinical instruction on their premises as part of Otero's course of study. Classes were taught and administered by their employees, including Kaiser's employees, respondent Hock Yeoh, M.D. (Yeoh), the director of Kaiser's dialysis department, and Lea Dee, the director of education at Kaiser's Sunset facility. Temple's employees included respondent Robin Rapp (Rapp).

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

The Kaiser entities, its employees, respondents Yeoh, Scott Rasgon, Annette Rogers, Rexie Enrico, Jay Trevide, Mary Miller, Richard Jones, Thelma Acosta, Bernadette Desvarieux and Molly Koslowsky (collectively Kaiser individuals), Rapp, Temple, employees of Mobile, respondents Malcom Eyman, Sylvester Sierra, Josephine Sierra and Luma Magnabijan (collectively Mobile employees), and 12 other corporate and individual defendants, are alleged to have acted in concert and conspired in knowingly misrepresenting that the hemodialysis program met the statutory requirements leading to certification as a hemodialysis technician, in issuing "phony" hemodialysis certificates and in falsely representing they would provide employment assistance at the conclusion of the program.

The FAC included causes of action for violation of the CLRA, violations of the Education Code, negligent misrepresentation, negligence per se and breach of contract against all defendants. The corporate defendants were also subject to causes of action for fraud/fraudulent inducement and negligence. Kaiser and Temple were also subject to a cause of action for negligence/premises liability.

Prior Demurrer and Appeal

The Kaiser entities and individuals demurred to the FAC on res judicata and collateral estoppel grounds, contending that the causes of action had been conclusively resolved against Otero in a previous lawsuit, *Ramiro v. Kaiser Foundation Health Plans, Inc.*, Los Angeles Superior Court case No. BC183039 (*Ramiro*) and on the grounds that the causes of action were not sufficiently pled. The trial court sustained the demurrer and entered a judgment of dismissal. Otero appealed. We affirmed the dismissal of the causes of action for fraud, negligent misrepresentation and negligence based on premises liability. We reversed the dismissal on the CLRA, Education Code, negligence, negligence per se and breach of contract causes of action. (*Frank Otero et al. v. Kaiser Foundation Health Plans, Inc., et al.* (April 29, 2004, B162277) [nonpub. opn.] 2004 WL 908942 at p. *9 (*Otero I*).)

Special Motions to Dismiss, Demurrers, Motion to Strike

After remittitur issued, the Kaiser entities again demurred to the CLRA, Education Code, negligence, negligence per se and breach of contract causes of action and filed a special motion to dismiss under section 1781, subdivision (c)(3).

The Kaiser individuals also filed a special motion to dismiss under section 1781, subdivision (c)(3), a demurrer to the CLRA, Education Code, negligence per se and breach of contract causes of action, and joined in all codefendants' demurrers.

The Mobile employees brought a motion to strike references to punitive damages and demurred to the CLRA, Education Code, negligent misrepresentation, negligence per se and breach of contract causes of action.

Temple joined in the Kaiser entities' demurrer. Rapp joined in the Kaiser individuals' demurrer. Both joined in the Mobile employees' motion to strike punitive damages.

Order

On December 21, 2004, the court entered its order granting the Kaiser entities' special motion to dismiss the CLRA claim on the ground that Otero failed to establish a "transaction" between the Kaiser entities and the students as required under section 1770. The court sustained without leave to amend the Kaiser entities' demurrer to the Education Code violations cause of action based on its judicial notice of PEC's certification as a continuing education provider. The court sustained with 20 days leave to amend the Kaiser entities' demurrer to the negligence, negligence per se and breach of contract claims.

The trial court granted the Kaiser individuals' special motion to dismiss the CLRA claim because the charging allegations were against the corporations, not the individuals. On the same ground, the court sustained without leave to amend the Kaiser individuals' demurrer to the Education Code violations, negligence per se, and breach of contract causes of action.

The court granted the Mobile employees' demurrer to all causes of action without leave to amend on the ground that the charging allegations were not against the

individuals. The court also granted their motion to strike punitive damages without prejudice.

Temple and Rapp's request to join in the Kaiser and Mobile employees' demurrers was granted. Their demurrer to the CLRA claim was sustained with 20 days leave to amend.[2]

The clerk served the order by mail on December 22.

Second Amended Complaint and Judgment of Dismissal

At the December 21, 2004 hearing, Temple's counsel requested that the court specify a time frame for an amendment if leave to amend were granted. Otero's counsel gave no indication at that time that he would be unavailable during much of the remainder of December and beginning of January. Later on December 21, the court granted Otero 20 days leave to amend certain causes of action. On December 23, Otero's counsel filed a "notice of unavailability" indicating he would be out of the country and unavailable from December 27 to January 12.

On February 1, Kaiser submitted a proposed order and judgment of dismissal, which the court signed and entered on February 3, 2005. Also on February 3, 2005, Otero's counsel filed a second amended complaint (SAC) and his declaration attesting to the facts that he was a sole practitioner, had filed a notice of unavailability through the second week in January 2005, had returned from a trip abroad but then was unable to return to work for another week due to illness and retrieved his mail during the third week in January discovering for the first time the court's December 21 ruling granting him 20 days leave to file the SAC.[3]

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[2] The Kaiser entities' and Kaiser individuals' demurrers to the CLRA claim were rendered moot by the court's dismissal of those claims under section 1781, subdivision (c)(3). But because Temple and Rapp had joined only in the Kaiser demurrers and not the special motion to dismiss, the court ruled on the demurrers to the CLRA cause of action as to Temple and Rapp.

[3] Otero's counsel did not seek relief from his late filing under Code of Civil Procedure section 473.

Kaiser filed a notice of entry of order and judgment of dismissal on February 7, 2005, and Otero filed his notice of appeal on that date.

DISCUSSION

I. Contentions and Issues Abandoned on Appeal

Otero presents three issues in his opening brief: Is the FAC "without merit" under section 1781, subdivision (c)(3)? Does the FAC adequately set forth the claims, or alternatively, were the deficiencies correctible by amendment? Does the FAC adequately plead agency? With respect to the first and third issues, Otero contends that the trial court erroneously failed to strike the declaration of Peter Pellerito, upon which Kaiser based its motion to dismiss, that he adequately demonstrated a "transaction" with the Kaiser defendants based on theories of actual or ostensible agency, that he qualified as a "consumer" under the CLRA, and that the education program qualified as "services" under the CLRA.

Otero did not separately address his second issue of the adequacy of his pleading. There are a number of other issues encompassed by the judgment that Otero does not address in his opening brief. By failing to do so, he has abandoned any appeal of those issues. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 (*Tiernan*); see also *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) The issues Otero has abandoned are as follows.

A. *Judgment for the Mobile Employees*

The Mobile employees brought a demurrer separate from those filed by the Kaiser entities and individuals, and the court entered a separate order sustaining their demurrer without leave to amend. Otero does not address the order on the Mobile employees' demurrer and has, therefore, abandoned any appeal of that order.

B. Education Code Violations

Otero does not address the Education Code violations cause of action in his opening brief. He makes only passing reference to the fact that the prior appeal found that violations of the Education Code were adequately pled and that, therefore, the trial court could not dismiss that cause of action pursuant to the demurrers at issue here. But passing reference in a brief is not sufficient to raise an issue on appeal. (*Golden Day Schools, Inc. v. Department of Education*. (1999) 69 Cal.App.4th 681, 695, fn. 9 [argument not preceded by appropriate heading waived]; *Dills v. Redwoods Associates, Ltd*. (1994) 28 Cal.App.4th 888, 890, fn. 1 (*Dills*) [issues must be developed and supported by argument and legal authority to be properly raised].) Moreover, the earlier demurrer did not consider the judicially noticed certification of PEC as a continuing education provider, which Otero has not challenged. Consequently, he has not perfected an appeal from the sustaining of all respondents' demurrers without leave to amend to the cause of action for violations of the Education Code.

C. Fraud, Negligent Misrepresentation and Premises Liability Against Temple and Rapp

The trial court's order did not address the fraud, negligent misrepresentation and premises liability claims against Temple and Rapp. Those claims vis-à-vis the Kaiser entities and individuals were disposed of in the previous appeal on the grounds of res judicata, and Otero's failure to distinguish between the various entities and individuals in violation of the rule that fraud must be pled with particularity. (*Otero I, supra,* 2004 WL 908942 at pp. *5–6.) Consequently, although both Kaiser demurrers state they are to the entire complaint, they actually discuss only causes of action other than fraud, negligent misrepresentation and premises liability. As a result, the trial court did not address those causes of action with respect to Temple and Rapp's joinder in the Kaiser demurrers. Temple and Rapp prefaced their joinder by stating that they were in

the same position as the Kaiser entities[4] and the individuals respectively. Otero does not assign error to the trial court's failure to address those causes of action with respect to Temple and Rapp. As a result he has abandoned his appeal of those issues. (*Tiernan, supra,* 33 Cal.3d at p. 216, fn. 4 [issues not raised on appeal are waived].)

D. Without Leave to Amend

Although Otero's opening brief lists as a separate issue his ability to cure by amendment any inadequacies in his pleading, he does not address that subject any further and has, therefore, failed to adequately present it for appellate review. (*Dills, supra*, 28 Cal.App.4th at p. 890, fn. 1.) We recognize that generally a plaintiff may demonstrate an ability to amend a complaint for the first time on appeal and thereby secure a reversal of a judgment of dismissal based on the sustaining of a demurrer without leave to amend. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43–44.) Still, any such issue must be adequately presented to the appellate court through discussion, legal argument and citation to be considered on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(B).) It is not sufficient simply to present an amended pleading as part of the clerk's transcript and list it as an issue without any further mention or explanation. (*Dills, supra,* 28 Cal.App.4th at p. 890, fn. 1.)

Based on Otero's abandonment of issues on appeal, the judgment as to the Mobile employees is affirmed in its entirety, the order dismissing the second cause of action for violations of the Education Code as to all respondents is affirmed, the order sustaining without leave to amend the negligence per se and breach of contract causes of action as to the Kaiser individuals and Rapp is affirmed, and the judgment of dismissal of the fraud, negligent misrepresentation and premises liability claims against Temple and the negligent misrepresentation claim against Rapp is affirmed.

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4 Temple also stated that it did not have a contract with PEC.

II. Untimely Amendment

The trial court granted Otero 20 days leave to amend a number of his causes of action. But Otero did not file his SAC until 18 days after that deadline had passed. The record indicates that Otero's counsel sought no relief from the trial court for his default. Yet, he attempts to explain his delinquency on appeal based on the fact that he filed a "Notice of Unavailability" alerting the trial court to his impending foreign trip from December 27 through January 12 and that unavailability along with a subsequent illness prevented him from timely amending.

Otero's counsel fails to address the fact that when the possibility of amending the complaint was discussed during the December 21 hearing, he did not alert the court to his upcoming unavailability and thus contributed to the court's granting leave to amend during his travel. (See *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 743 [acquiescence in purported error constitutes waiver on appeal].) Nor does he address the problem that his "Notice of Unavailability" was not filed until two days after the court had entered its order granting him 20 days leave to amend. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1474 (*Smith*) [""The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later""].)

Counsel also pleads his status as a sole practitioner to excuse the fact that he did not see the order granting 20 days leave until after he returned to his office from his trip and illness. But Otero has provided no legal support for the proposition that a vacationing or ill attorney is excused as a matter of law from reviewing or having someone else review his mail, complying with court orders, or timely seeking extensions simply because he practices alone. (See *Caldwell v. Methodist Hospital* (1994) 24 Cal.App.4th 1521, 1525 [press of business, intervening holiday season insufficient to excuse late filing].) Otero's counsel has been cautioned before in this lawsuit that his ethical obligations include not accepting any matter that he is not equipped to handle.

(See Rules Prof. Conduct, rule 3-110.) Yet he persists in a disturbing pattern of blaming successive defaults on his status as a sole practitioner.[5]

Otero has demonstrated no error with respect to the trial court's entry of judgment after he failed to timely amend his complaint. Consequently, the judgment of dismissal of the negligence, negligence per se and breach of contract causes of action against the Kaiser entities and Temple, the CLRA causes of action against Temple and Rapp and the punitive damages allegations as to all respondents is affirmed.

III. The CLRA

A. Motion to Dismiss and Standard of Review

Section 1780, subdivision (a) provides that "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person . . . ."

A class action may be brought pursuant to section 1781, subdivision (a), which provides that "[a]ny consumer entitled to bring an action under Section 1780 may, if the

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[5] In *Otero I*, we quoted the trial court: "'[O]n the current record before me I would not be able to find adequacy of representation for purposes of certifying a class with the current counsel based on the record of counsel's performance in the prior suit.'" (*Otero I*, *supra*, 2004 WL 908942 at p. *2.) We also wrote: "The motion for leave to amend in the *Ramiro* action was made on the grounds that the operative complaint failed to adequately 'articulate' the plaintiffs' theories of relief. In support of the motion, plaintiffs' counsel, Tristram Buckley, who also represents appellants here, filed a declaration in which he stated: 'I drafted and filed the Original Complaint in this action only months after being sworn in as a member of the bar and only weeks after opening my first office. The Original Complaint was admittedly inartfully drafted and failed to properly articulate Plaintiffs' theories of relief. In fact, the day I filed Plaintiffs' Original Complaint in this action was the first time I had ever filed a Complaint. I am a solo practitioner with limited resources and no support staff.' At the hearing on the [first] demurrer to the FAC in the instant case, Mr. Buckley again mentioned his inexperience in the *Ramiro* action, and the trial court reminded counsel of his professional obligations, stating: 'Let me just stop you from admitting fault over and over again for your own sake. The canons of ethics for lawyers also say that you shouldn't take on matters that you're not prepared to handle, that you don't have the expertise to handle.'" (*Id.* at p. *6, fn. 3.)

unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780." Section 1781, subdivision (c)(3) permits dismissal of a CLRA class action if an "affidavit of any person or persons having knowledge of the facts" shows the action to be "without merit or there is no defense to the action." (See also *Olsen v. Breeze, Inc*. (1996) 48 Cal.App.4th 608, 623–624 [§ 1781, subd. (c)(3) permits resolution of CLRA claims prior to trial].) That section also provides that "[a] motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a)." (§ 1781, subd. (c)(3).)

Despite the section's admonition against summary judgments, courts have applied the standards for summary judgment and summary adjudication motions to no-merit determinations under the CLRA such as the claim presented here. (*Smith, supra,* 135 Cal.App.4th at pp. 1474–1475.) Thus, we review the trial court's order dismissing the CLRA cause of action de novo. Moreover, "'"we construe the moving party's affidavits strictly, construe the opponent's papers liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." [Citations.]' [Citation.]" (*Id*. at p. 1474.)

B. "No Merit"

1. No "Transaction" with Kaiser Entities

Section 1770 makes unlawful a list of "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . . ." (§ 1770, subd. (a).) Section 1761, subdivision (e) defines "transaction" as "an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement."

Kaiser bore the initial burden of demonstrating that Otero could not "'establish at least one element of the cause of action' [citation], which the defendant can do 'by showing that the plaintiff does not possess, and cannot reasonably obtain, needed

evidence[.]' [Citation.]" (*Smith, supra*, 135 Cal.App.4th at p. 1473.) Kaiser relied on its contract with PEC and PEC's contract with the students to meet its burden of proving that the only transaction with respect to the hemodialysis technician educational program was between the students and PEC, not Kaiser.

(a) *The Pellerito Declaration and the PEC/Kaiser Contract*

The contract between Kaiser and PEC was authenticated by the declaration of Peter Pellerito who had been the business administrator for the Southern California Permanente Medical Group during the relevant period and was a signatory to the contract. Otero challenges the trial court's overruling of his objection to the declaration on the grounds that it was not based on personal knowledge. Otero argues that Pellerito admitted that he was not familiar with the PEC hemodialysis program. But in his declaration, Pellerito attests only to the terms of the contract that he signed and Kaiser's usual course of dealing with educational providers such as PEC. Those matters were within his personal knowledge and the trial court did not abuse its discretion in overruling Otero's objection. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900 [appellate courts review evidentiary rulings for an abuse of discretion].)

Pellerito attested to the facts that Kaiser enters into dozens of contracts with medical occupational educational institutions such as PEC pursuant to which Kaiser provides its facilities for clinical training. Pursuant to that course of dealing and the terms of the contract, he declared that Kaiser made no representations to PEC's students regarding certification, accreditation or employment opportunities; Kaiser collected no tuition or fees from the students; PEC did not pay to use Kaiser's facilities which were provided as a community service; and the owner of PEC, Joey Dee, was not an agent of Kaiser and was not authorized to act on its behalf. Additionally, PEC agreed in the contract that its curriculum for Hemodialysis Patient Care Technicians "complies with all applicable laws and regulations." The contract also provided that the "Agreement is not intended and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture or association between Center [PEC] and Hospitals or Center and Medical Group [Kaiser] and their employees, students, partners or agents, but rather

is an agreement by and among independent contractors. . . . ," and that PEC was not authorized to publish or advertise using the Kaiser name or to use language that could support the inference of a relationship between PEC and Kaiser.

Otero argues that the trial court improperly relied on the contract between PEC and Kaiser because that contract was not divulged to the students. He relies on *Williams v. More* (1883) 63 Cal. 50, 51 which held that a client's contract with one partner of a law firm constitutes a contract with the entire firm. But in that case, the existence of and scope of the partnership was not at issue. Here, Kaiser produced evidence that its relationship with PEC was that of independent contractor, not partner, joint venturer or any other relationship that would support vicarious liability. We note that contracts such as this that explicitly define the signatories' relationships are enforced. (*Bescos v. Bank of America* (2003) 105 Cal.App.4th 378.) Therefore, the trial court properly considered the contract.

(b) *Yim Declaration and Student Contracts*

Kaiser also submitted the declaration of one of its attorneys, B. Casey Yim, that authenticated documents previously produced during discovery in the earlier *Ramiro* action. Yim attached the following: an exemplar contract between PEC and its students; an exemplar receipt showing the payment of tuition by a student to PEC; and a PEC brochure describing the hemodialysis training program. Yim also authenticated a copy of PEC's certification as a continuing education provider by the Board of Registered Nursing, which the trial court judicially noticed. These exhibits were offered to show that the students contracted directly with and paid tuition to PEC, not Kaiser and that the course brochure did not reference Kaiser.

(c) *Otero's Evidence*

The parties dispute the evidentiary standard applicable to Otero's opposition to the special motion to dismiss. Otero relies on *Anthony v. General Motors Corp*. (1973) 33 Cal.App.3d 699, 707 (*Anthony*) to argue that he did not need to provide admissible evidence in opposition to Kaiser's evidence: "[I]t is not obligatory that the proofs . . . show that plaintiffs will necessarily prevail at trial. . . . It is not material that those facts

may not appear in the record in a form, or with the foundation, which would make such findings and statements as now presented, admissible in evidence at a trial. It is enough that it appears that evidence in support of plaintiffs' theory may be available when the case goes to trial." (*Id*. at p. 707.)

Kaiser, on the other hand, argues that *Anthony* does not obviate the need to present admissible evidence in opposition to a no-merit motion but only allows the court to "look beyond the form of the evidence" to assess merit. Additionally, Kaiser points to those courts that apply the evidentiary standards applicable in summary judgment and summary adjudication motions to no-merit determinations under the CLRA. (*Smith, supra*, 135 Cal.App.4th at p. 1474; see also *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1359 (*Consumer Advocates*) [court could "see no meaningful distinction in the choice" between summary judgment and no-merit dismissal].)

In either case, it is clear that Otero was required to produce some minimal level of proof beyond the mere allegations in his complaint and arguments of counsel to overcome Kaiser's showing based on the contracts. (See *Petherbridge v. Altadena Fed. Sav. & Loan Assn.* (1974) 37 Cal.App.3d 193, 202 [more than a scintilla of evidence required for class action conspiracy charges to proceed to trial]; *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 70 [class plaintiff must demonstrate "substantial possibility" of proving conspiracy in order to survive dismissal].) Thus, even without applying the strict evidentiary standards applicable in summary judgment and adjudication motions, we agree with the trial court that Otero failed to minimally establish a transaction between the students and Kaiser.

Otero offered 28 exhibits and a declaration of counsel to establish a transaction between the students and Kaiser in opposition to the motion to dismiss. Otero's exhibits generally fall into these categories:

(1) Unauthenticated Kaiser form documents and educational materials that do not reference any student named as a plaintiff or other defendant: a Kaiser document entitled "Care and Management of Your Access"; a form Kaiser hemodialysis record; a Kaiser policy and procedure page regarding the requirement of immunization; a Kaiser policy

and procedure page describing the educational coordinator for clinical affiliations; a Kaiser form confidential platelet donor information; pages from a Kaiser document entitled "Hemodialysis Patient Information"; Kaiser form educational documents; another Kaiser hemodialysis record; and a Kaiser document entitled "Assessment." At best these unauthenticated documents establish facts that are uncontested, namely, that Kaiser employees taught the hemodialysis courses on Kaiser's premises, using Kaiser's materials. But that does not establish an agreement between Kaiser and the students with regard to certification or later employment assistance.

(2) Unauthenticated miscellaneous documents including a biography of Yeoh; a Kaiser "Tuition Reimbursement Program Course Preapproval Request" referencing a reimbursement request by a Kaiser employee for a PEC hemodialysis training course and indicating denial because "not an approved accredited body," and a flyer for an awards banquet by the Kaiser Permanente Asian Pacific American Network. Again, no factual link is drawn between these documents and an agreement between Kaiser and the students except in the arguments presented in the briefs. Counsel's arguments do not meet any standard of proof because they do not constitute evidence. (*In re Zeth S*. (2003) 31 Cal.4th 396, 414, fn. 7 (*Zeth S*.) [counsel's arguments in brief are not evidence].)

(3) Unauthenticated documents referencing Lea Dee. These consist of a Kaiser business card of Lea Dee identifying her as "Clinical Educator" in the "Department of Education and Training"; a form PEC course contract with a student signed by Lea A. Dee for PEC and with an attached Kaiser business card for Lea A. Dee; the first page of a letter to "Participant" on Lea Dee's Kaiser letterhead stating in part: "Congratulations! You have been accepted to the Hemodialysis Training Course . . ."; and payment receipts and checks indicating student payments to Lea Dee for PEC.

On their face, these tend to show factual links between Dee, Kaiser and PEC, and in order to evaluate their sufficiency to establish a transaction between Kaiser and the students, we turn to Otero's arguments with respect to agency.

2. No Actual Agency Shown

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (§ 2316.) Actual agency is generally expressly conferred by agreement. (*Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.)

Otero proffered no evidence below of any act or agreement by Kaiser conferring an actual agency on Dee or PEC, nor any act allowing Dee or PEC to believe they were agents of Kaiser for the purposes of representing that the PEC course led to certification, to confer that certification or to make any representations regarding employment at the conclusion of the program. Rather, the contract with PEC proffered by Kaiser stated the opposite. The bare fact that Dee was Kaiser's employee does not mean she was authorized to do the acts leading to the damages alleged in the FAC.

3. No Ostensible Agency Shown

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (§ 2317.) While actual authority focuses on what the principal leads the agent to believe, ostensible authority focuses on what the principal leads a third person to believe. Thus, an essential element of proving ostensible authority is the third party's reasonable belief in the agent's authority. (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 747.)

Otero's assertion of ostensible agency fails because he provided no evidence that the students believed they had an agreement with Kaiser with respect to their certification and the representations of later employment. Otero prefaced his exhibits with this statement: "Attached hereto are no less than 28 Exhibits which support Plaintiffs' contentions. In addition, scores of Plaintiffs were deposed by the Defendants and during those depositions, Plaintiffs testified that they believed, at all times material, that this course was offered by Defendants Kaiser Pemanente, Mobile Dialysis and Temple Community Hospital and that the instructors were the aforesaids' employees. While Plaintiffs' 28 Exhibits clearly show the existence of 'triable facts' and as Plaintiffs need

not prove their case at this stage of the proceedings, Plaintiffs are ready, willing and able to execute Declarations which further support their claims and Exhibits one through 28." Otero again relies on plaintiffs' deposition testimony in his arguments on appeal: "Plaintiffs have alleged, testified in their depositions and submitted Exhibits which show they entered into a transaction with these Defendants." But Otero provided neither excerpts from the plaintiffs' depositions, nor declarations of the plaintiffs. If he had that evidence, the time to provide it was in opposition to the motion to dismiss. Having failed to do so, Otero's claim of any ostensible agency relationship also fails. Given that Kaiser proffered contracts showing that the students reached an agreement only with PEC, Otero could not rely simply on the allegations in his complaint and unsubstantiated statements in his briefs to prove otherwise.[6]

Much of Otero's other evidence fails as well. For example, he contends that a PEC course contract with Lea Dee's business card attached supports ostensible agency. But he offers no evidence authenticating the attachment of the business card to the form contract, nor showing how or when the business card was attached. Additionally, Otero bases many of his arguments in his opening brief on factual assertions with no basis in the record. For example, he asserts that Dee met with students at her Kaiser office during Kaiser business hours "wearing a Kaiser Permanente lab coat and ID badge," that students who telephoned Kaiser about the hemodialysis course were referred to Dee and that Dee recruited students "from her office in Kaiser." But Otero proffered no evidence of those facts. (*Zeth S., supra,* 31 Cal.4th at p. 414, fn. 7 [counsel's arguments in brief are not evidence].)

Otero thus failed to provide evidence of a transaction between the Kaiser entities and the students.

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6 We note that by the time he was called upon to oppose the motion to dismiss there had been a long history of discovery extending back to the *Ramiro* action pertinent to Otero's claims.

4. No "Transaction" with Kaiser Individuals Shown

The trial court granted the Kaiser individuals' motion to dismiss based on the fact that the charging allegations were against the entities, not the individuals. Our review of the charging allegations contained in paragraphs 128 through 158 of the FAC supports the trial court's conclusion that the CLRA claim was only stated against the corporate defendants. Moreover, the only evidence that references any Kaiser individual is the undated Yeoh biography without any showing that it was read or relied upon by any student or in any way indicative of an agreement with the students. Consequently, no evidence of any agreement with the Kaiser individuals and the students was adduced below.

We concur in the trial court's dismissal of Otero's CLRA claims against the Kaiser entities and individuals based on a lack of showing of a transaction with the students.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ